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IN THE

Supreme Court of the United States

October Term, 1975

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No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAVER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

SAMUEL E. GATES
RICHARD I. JANVEY
299 Park Avenue
New York, New York 10017
Attorneys for Respondent

of Counsel:
DEBEVOISE, PLIMPTON, LYONS & GATES
BINGHAM, DANA & GOULD

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statutes Involved	2
Statement	3
Summary of Argument	5
Argument	
Point I—The venue requirement of the National Bank Act is mandatory in application and takes precedence over the venue provision of the Exchange Act in suits against national banks	7
Point II—Section 94 of the National Bank Act has not impliedly been repealed by the venue provisions of Section 27 of the Exchange Act	9
A. Petitioner Has Failed to Show Any Congressional Intent to Repeal Section 94 of the National Bank Act	11
B. Petitioner Has Failed to Demonstrate Positive Repugnance or Irreconcilable Conflict Between Section 94 of the National Bank Act and Section 27 of the Exchange Act	15
Point III—The alleged policy considerations urged by petitioner to support his argument of implied repeal provide no basis for ignoring the plain mandate of Congress	19
Point IV—No waiver of the venue provisions of Section 94 of the National Bank Act has occurred	29
Conclusion	31
Appendix	33

TABLE OF AUTHORITIES

PAGE

Cases:

Allied Steel & Tractor Products, Inc. v. First National City Bank of New York, 54 F.R.D. 256 (N.D. Ohio 1971) 8
Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 58 F.R.D. 429 (D. Hawaii 1973) 8
Amell v. United States, 384 U.S. 158 (1968) 10

Beals v. Hale, 45 U.S. (4 How.) 13 (1845) 10
Blanchette v. Connecticut General Insurance Corporations ("Regional Rail Reorganization Act Cases"), 419 U.S. 102 (1974) 11, 12, 13
Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952) 17, 20, 21, 30
Bulova Watch Co. v. United States, 365 U.S. 753 (1961) 10, 16
Bruns, Nordeman & Co. v. American National Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968) 7, 8, 9, 20

Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co., 385 U.S. 182 (1966) 21
Carpenter v. Hall, 352 F. Supp. 806 (S.D. Tex. 1972) 8, 9
Casey v. Adams, 102 U.S. 66 (1880) 27
Chew Heong v. United States, 112 U.S. 536 (1884) 11
Cook County National Bank v. United States, 107 U.S. 445 (1882) 17

Easton v. Iowa, 188 U.S. 220 (1903) 28
Elof Hansson, Inc. v. United States, 178 F. Supp. 922 (Cust. Ct. 1959), *rev'd on other grounds,* 296 F.2d 779 (C.C.P.A. 1960), *cert. denied,* 368 U.S. 899 (1961) 16
Erlenbaugh v. United States, 409 U.S. 239 (1972) 14
Ex Parte Crow Dog, 109 U.S. 556 (1883) 16
Ex Parte United States, 226 U.S. 420 (1913) 10

PAGE

Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975) 13
First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 22
First National Bank of Boston v. United States District Court, 468 F.2d 180 (9th Cir. 1972) 8
First National Bank of Charlotte v. Morgan, 132 U.S. 141 (1889) 20, 27
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) 10

General Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699 (S.D.N.Y. 1966) 8, 11, 12, 14, 25
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) 23

International Refugee Organization v. Bank of America, 86 F. Supp. 884 (S.D.N.Y. 1949) 17

Jones v. Mayer Co., 392 U.S. 409 (1968) 9

Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) 8

Levin v. Great Western Sugar Co., 274 F. Supp. 974 (D. N.J. 1967) 8, 9, 11

Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom.* Marcello v. Bonds, 349 U.S. 302 (1955) 16
McClung v. LaSalle National Bank of Chicago, Ill., 387 F. Supp. 977 (S.D. Iowa 1975) 8, 19
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 7, 19, 25, 26, 28
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 11, 23
Michigan National Bank v. Robertson, 372 U.S. 591 (1963) 7, 19, 20, 29
Morton v. Mancari, 417 U.S. 535 (1974) 9, 13, 15, 16

Northside Iron and Metal Co. v. Dobson and Johnson, Inc., 480 F.2d 798 (5th Cir. 1973) 9, 25, 26, 27, 30

PAGE

Odette v. Shearson, Hammill & Co., 394 F. Supp. 946 (S.D.N.Y. 1975) 8

Posadas v. National City Bank, 296 U.S. 497 (1936) 9

Red Rock v. Henry, 106 U.S. 596 (1882) 10
Rodgers v. United States, 185 U.S. 83 (1902) 16
Rome v. Eltra Corp., 297 F. Supp. 314 (E.D. Pa. 1969) 8
Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 852 (3d Cir. 1973) 8, 9, 14

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 11, 23
State v. Stoll, 84 U.S. (17 Wall.) 425 (1873) 11
Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970) 8

U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) 29
United States v. Borden Co., 308 U.S. 188 (1939) 10, 13, 14, 23
United States v. Healey, 160 U.S. 136 (1895) 10
United States v. Jackson, 302 U.S. 628 (1938) 11
United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975) 23
United States National Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970) 8

Wilmot v. Mudge, 103 U.S. 217 (1880) 11
Washington v. Miller, 235 U.S. 422 (1914) 16

PAGE

Statutes and Rules:

Clayton Act, 15 U.S.C. §§12-27 (1970)
Section 4, 15 U.S.C. §15 (1970) 29
Section 12, 15 U.S.C. §22 (1970) 29
Consumer Credit Protection Act, 15 U.S.C. §§1601 *et seq.* (1970)
Section 130, 15 U.S.C. §1640(e) (1970) 29
Fed. R. Civ. P. Rule 12(2) 3
Fed. R. Civ. P. Rule 12(3) 3
Glass-Steagall Act of 1934 (Banking Act of 1933), ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C. ch. 2, 3, and 6 (1970) 15
National Bank Act, 12 U.S.C. §§1 *et seq.* (1970)
12 U.S.C. §94 (1970) 1, 2, 4, 5, 6, 9, 13, 15, 17, 18, 19, 21, 22, 23, 27, 28, 29, 31
12 U.S.C. §§12-78 (1970) 3
New York Banking Law §131(3) (McKinney 1971) 2, 5, 29, 30, 33–34
Securities Act of 1933, 15 U.S.C. §§77a, *et seq.* (1970)
Section 3(a)(2), 15 U.S.C. §77c(a)(2) (1970) 13
Section 12(2), 15 U.S.C. §77l(2) (1970) 13
Securities Exchange Act of 1934, 15 U.S.C. §§78a, *et seq.* (1970)
Section 10b, 15 U.S.C. §78j(b) (1970) 4
Section 12, 15 U.S.C. §78l(i) (1970) 13
Section 27, 15 U.S.C. §78aa (1970) 1, 2, 4, 5, 6, 9, 15, 23, 27
12 U.S.C. §481 (Supp. 1975) 24
28 U.S.C. §1391 (1970) 16, 17
28 U.S.C. §1391(c) (1970) 17
28 U.S.C. §1394 (1970) 21
28 U.S.C. §1404(a) (1970 18

PAGE

Regulations of the Comptroller of the Currency, 12 C.F.R. §4.11 (1975) 25
Securities Exchange Act Rule 10b-5, 17 C.F.R. §240.10b-5 (1975) 4

Legislative Material:

105 Cong. Rec. 3475 (1959) (remarks of Senator Robertson) 22
S. 1541, 85th Cong., 1st Sess. (1957) 21
Sen. Comm. on Banking and Currency, S. Rep. No. 1455, 73rd Cong., 2d Sess. (1934) 13
2 U.S. Code Cong. and Admin.News 2232 (1959) 22

Constitutional Provisions:

U.S. Const. amend. V 25
U.S. Const. amend. XIV 25

Miscellaneous:

1A Sutherland, Statutes and Statutory Construction §23.10 (4th ed., C. Sands 1972) 14
1974 Annual Report of the Comptroller of the Currency 27

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Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

Questions Presented

(i) Whether section 94 of the National Bank Act (12 U.S.C. §94) has been impliedly repealed by the venue provisions of section 27 of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. §78aa)?

(ii) Whether The First National Bank of Boston, which is established in Boston, Massachusetts, waived the mandatory venue provisions of section 94 of the National Bank Act by qualifying, under section 131(3) of the New York Banking Law, to engage in limited fiduciary activities in the State of New York?

Statutes Involved

Section 94 of the National Bank Act (12 U.S.C. §94) provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Section 27 of the Exchange Act (15 U.S.C. §78aa) provides in pertinent part:

> "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Section 131(3) of the New York Banking Law is set forth in an Appendix hereto.

Statement

The First National Bank of Boston (the "Bank") is a national banking association organized and existing under the laws of the United States. See 12 U.S.C. §§12-78 (1970). The Bank, which is established in Boston, Massachusetts, was named as a defendant in this action and moved, pursuant to Rule 12(2) and (3), Fed. R. Civ. P., for an order dismissing the action as to it on the ground that venue in the Southern District of New York is improper. The Bank's motion was granted by the United States District Court for the Southern District of New York, and judgment entered thereon. (A. 89a) The court found that the Bank is established in Boston, Massachusetts, and hence could be sued only in the United States District Court for the District of Massachusetts. The United States Court of Appeals for the Second Circuit, in open court and without opinion, affirmed the judgment of the District Court. (A. 94a)

The complaint in this alleged class action purports to assert claims against TelePrompter Corporation ("TelePrompter"), an issuer of common stock traded on the New York Stock Exchange; Touche Ross & Co., TelePrompter's independent auditors; 22 individuals who are or were officers and/or directors of TelePrompter;* and the Bank, as agent bank with respect to a $150 million Revolving and Term Credit Loan, dated as of April 26, 1973. Petitioner challenges the accuracy of various press releases, reports and financial statements issued by Tele-

* Defendant TelePrompter and the other defendants listed as such in the caption above were not parties to the proceeding in the United States Court of Appeals for the Second Circuit, and have no direct interest in the outcome of this proceeding.

Prompter during 1973. It is claimed that information disseminated by TelePrompter to the public violated section 10b of the Exchange Act, 15 U.S.C. §78j(b), the statutes of the State of New York and the common law. Venue is based on section 27 of the Exchange Act, 15 U.S.C. §78aa.

The complaint purports to charge a violation of Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated by the Securities Exchange Commission (the "Commission"). It is alleged that the defendants "aided and abetted TelePrompter . . . and/or joined or participated in one continuous course of conduct and plan of action" (A. 23a), and failed adequately to disclose information with respect to certain financial difficulties being experienced by TelePrompter.

Specifically, it is alleged that the Bank, as a lender to TelePrompter, had "*fiduciary obligations to the investing public*" (italics added) to disclose to and notify the Commission, the New York Stock Exchange and the public generally of certain information which had come to its attention as a lender to TelePrompter, which was inconsistent with particular statements made by TelePrompter concerning its financial condition. (A. 23a-24a)*

* Petitioner assumes that venue in the Southern District of New York is proper. However, assuming *arguendo* that the Bank owed petitioner, as well as other shareholders of TelePrompter located throughout the United States, a duty to notify the Commission, the New York Stock Exchange and the investing public of inaccuracies and omissions in public information disseminated by TelePrompter, such duty was breached only in Boston, Massachusetts—the district wherein the Bank is established. Any communication with the Commission or the New York Stock Exchange would necessarily have emanated from the Bank's headquarters in Boston, Massachusetts. Thus, petitioner cannot establish that venue under section 27 of the Exchange Act is proper in the Southern District of New York. As a consequence, no conflict between that section and section 94 of the National Bank Act is presented by this action.

Petitioner concedes the Bank is "established" within the meaning of section 94 of the National Bank Act in Boston, Massachusetts, and that it maintains no office or agent in New York. However, petitioner now asserts, as he did in the lower courts, that the Bank waived the provisions of section 94 of the National Bank Act by conducting banking business in New York State. This asserted waiver is alleged to have occurred on January 15, 1971, when the Bank, as a foreign bank, qualified pursuant to section 131(3) of the New York Banking Law to perform certain limited fiduciary activities in New York State with respect to the administration of trusts and estates. The lower courts found to the contrary.

At no time did petitioner dispute, either in the District Court or in the Court of Appeals, that venue in this action with respect to the Bank is determined by section 94 of the National Bank Act.

Summary of Argument

Petitioner now seeks—and for the first time—to raise the issue of whether the venue provisions of section 94 of the National Bank Act have by implication been repealed *pro tanto* by the venue provisions of section 27 of the Exchange Act.* This issue was never raised in the District Court nor was it reviewed by the Court of Appeals. On the foregoing, we respectfully submit that certiorari was improvidently granted by this Court.

Petitioner has utterly failed to establish a clear and manifest intent on the part of Congress to repeal by impli-

* Petitioner and the Commission refer in their briefs to the Securities Act of 1933. However, this action presents no issue involving the venue provisions of that Act.

cation the venue provisions of the National Bank Act. Similarly, he has failed to establish that there is a positive repugnancy between the venue provisions of the National Bank Act and those of the Exchange Act. Petitioner and the Commission, as *amicus curiae,* rely on speculation and advert to specious policy arguments, which have heretofore been rejected by this Court, in an effort to establish that section 94 of the National Bank Act has been impliedly repealed by section 27 of the Exchange Act. Such arguments merely obscure the issues presented to this Court. Petitioner fails to offer any convincing reason as to why the venue provisions of the National Bank Act and the Exchange Act cannot co-exist, as indeed they can, and have for over forty years.

It is abundantly clear from this Court's recent decisions that the venue requirements of the National Bank Act are mandatory in their application to suits against national banks. This rule applies even though petitioner can satisfy the venue requirements of the Exchange Act. Any judicial change in the venue provisions of the National Bank Act would be inappropriate and an incursion upon the legislative prerogatives of Congress. National Banks have sought and obtained their charters and thereafter acted on the assumption that section 94 is fully effective.

Petitioner asks this Court to take judicial notice of what he considers to be the overriding national importance of the Exchange Act and thereby to repeal the venue provisions of the National Bank Act, which in petitioner's own subjective view are of minor importance. It is submitted that such reasoning cannot serve as a basis for finding a repeal by implication. This Court and almost all of the lower federal courts which have construed the venue provisions of the National Bank Act have concluded that any change in these provisions should be made by Congress.

ARGUMENT

POINT I

The venue requirement of the National Bank Act is mandatory in application and takes precedence over the venue provision of the Exchange Act in suits against national banks.

Section 94 of the National Bank Act is mandatory and requires that all transitory actions against a national bank be brought in the district in which it is established. *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555 (1963); *Michigan National Bank* v. *Robertson,* 372 U.S. 591 (1963). In *Mercantile National Bank* the plaintiff sued two national banks, among others, in a county other than that in which they were located. The banks' motion to dismiss the action for improper venue prompted this Court to construe section 94 as follows:

> "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will." *Mercantile National Bank, supra* at 560.

The fact that the instant action was brought in the federal courts, not in state courts as in *Mercantile National Bank,* and that it purports to be brought pursuant to the Exchange Act does not make section 94 any less mandatory as to where suit must be brought.*

* This Court, in *Mercantile National Bank,* did not have occasion to pass upon the issue of whether section 94 should be given a similar mandatory reading in an action in a federal court. But, Judge Friendly in *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300, 303 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968), observed: ". . . it would indeed strain language to say that the same verbs were merely permissive with respect to suits in federal courts although prohibitory as to actions in state ones."

Two United States Courts of Appeals have rejected, unanimously in each case, petitioner's argument of "implied repeal" of section 94. The Courts of Appeals for the Second and Ninth Circuits have concluded that Congress did not, by the broad and general venue language of the Exchange Act, amend, repeal or supersede the clear and explicit command of section 94. *Klein* v. *Bower,* 421 F.2d 338 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *First National Bank of Boston* v. *United States District Court,* 468 F.2d 180 (9th Cir. 1972); and *United States National Bank* v. *Hill,* 434 F.2d 1019 (9th Cir. 1970).

The United States Court of Appeals for the Third Circuit has reached a contrary result. *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 852 (3d Cir. 1973).* It is submitted that *Ronson* and the District Court opinion in *Levin* v. *Great Western Sugar Co.,* 274 F. Supp. 974 (D. N.J. 1967)* upon which *Ronson* was premised and *Carpenter* v. *Hall,* 352 F. Supp. 806 (S.D. Texas 1972) are contrary to the overwhelming weight of precedent and erroneous in their reasoning.** Accordingly, the rationale of *Ronson* should be rejected by this Court.

* Although no Court of Appeals has considered the holding of *Ronson* since its issuance, two District Courts have specifically refused to follow its holding: *Odette* v. *Shearson, Hammill & Co.,* 394 F. Supp. 946, 950 (S.D.N.Y. 1975) and *McClung* v. *La Salle Nat'l Bank of Chicago, Ill.,* 387 F. Supp. 977, 979 (S.D. Iowa 1975).

Moreover, we have been unable to find any opinion issued by any District Court subsequent to the *Ronson* decision which has followed *Ronson's* reasoning.

The majority of the District Courts that earlier had considered the issue rejected the contention that the venue provisions of section 94 have been impliedly repealed or amended by those of the Exchange Act: *Allied Steel & Tractor Products, Inc.* v. *First Nat'l City Bank of New York,* 54 F.R.D. 256, 259 (N.D. Ohio 1971); *Swiss Israel Trade Bank* v. *Mobley,* 319 F. Supp. 374, 375 (S.D. Ga. 1970); *Rome* v. *Eltra Corp.,* 297 F. Supp. 314, 318 (E.D. Pa. 1969); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F. Supp. 699, 706 (S.D.N.Y. 1966); *cf. Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.,* 58 F.R.D. 429, 431 (D. Hawaii 1973). Only *Levin* v. *Great Western Sugar Co.,* 274 F. Supp. 974 (D.N.J. 1967) and *Carpenter* v. *Hall,* 352 F. Supp. 806 (S.D. Texas 1972) are to the contrary.

POINT II

Section 94 of the National Bank Act has not impliedly been repealed by the venue provisions of Section 27 of the Exchange Act.

Petitioner and the Commission argue that the decisions of the Second and Ninth Circuits fail to recognize that the venue provisions of the Exchange Act impliedly have repealed section 94 of the National Bank Act. However, "the cardinal rule is that repeals by implication are not favored." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936); *see Morton* v. *Mancari,* 417 U.S. 535, 549 (1975); *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968). In order to establish that section 27 of the Exchange Act impliedly repealed section 94, petitioner must demonstrate that: (*i*) the intention of Congress to repeal the earlier statute is clear and manifest and (*ii*) there is a positive repugnancy between the two statutes. Petitioner bears the burden of persua-

* The District Court in *Levin* acknowledged that its conclusion of "implied repeal" was predicated on "a quick examination of the 1933 and 1934 Securities Acts." *Id.,* at 978.

** Petitioner's reliance on *Carpenter* v. *Hall, supra,* and his implied suggestion (Br. 19) that the Fifth Circuit would not follow the decision of the Second Circuit in *Bruns, Nordeman & Co., supra,* is misplaced given the later decision of the Fifth Circuit in *Northside Iron and Metal Co.* v. *Dobson and Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973). In that case it was squarely held that section 94 was mandatory in its application. It must be assumed that in making its decision the Fifth Circuit was well aware of the decision in *Carpenter* v. *Hall.*

sion on each of these issues. *Amell* v. *United States,* 384 U.S. 158, 165-166 (1968); *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-229 (1957).

In the leading case *United States* v. *Borden Co.,* 308 U.S. 188, 198-99 (1939), the Court stated:

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. [citation omitted.] *The intention of the legislature to repeal 'must be clear and manifest'* [citations omitted]. It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be '*a positive repugnancy* between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' " (italics added.)

This view has been expressed by this Court in many ways, at many times and in the strongest possible terms. ". . . [T]he intention of the legislature to repeal must be clear and manifest" *Red Rock* v. *Henry,* 106 U.S. 596, 602 (1882); there can be no such repeal unless the implication is "irresistible" *Ex Parte United States,* 226 U.S. 420, 424 (1913); or unless the alleged repealing statute is "so clearly repugnant as to imply a negative" *Beals* v. *Hale,* 45 U.S. (4 How.) 13, 17 (1845).*

* It is the "duty" of the Court "to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each." *United States* v. *Healey,* 160 U.S. 136, 146 (1895). A later enactment is not to be construed as impliedly repealing a prior law "unless no other reasonable construction can be

(footnote continued on next page)

With respect to the Exchange Act specifically, "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).

A. Petitioner Has Failed to Show Any Congressional Intent to Repeal Section 94 of the National Bank Act.

Petitioner has not and indeed cannot offer any evidence of intent, either express or implied, on the part of Congress to repeal section 94 of the National Bank Act. This Court recently considered an argument for repeal by implication in *Blanchette* v. *Connecticut General Insurance Corporations* ("Regional Rail Reorganization Act Cases"), 419 U.S. 102 (1974). In quoting from the Special Court's opinion, this Court noted:

> " 'Presumably Congress had given serious thought to the earlier statute .... Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the *legislature's using language showing that it has made a considered determination* to that end . . . .' " *Id.,* at 134 (italics added).

applied." *United States* v. *Jackson,* 302 U.S. 628, 631 (1938). To find a repeal, it must be "impossible" for both provisions under consideration to stand. *Wilmot* v. *Mudge,* 103 U.S. 217, 221 (1880). Repeals by implication "are never admitted where the former can stand with the new act." *Chew Heong* v. *United States,* 112 U.S. 536, 549 (1884). "If, by any reasonable construction, the two statutes can stand together, they must so stand." *State* v. *Stoll,* 84 U.S. (17 Wall.) 425, 431 (1873). The proper approach is to "reconcile" the operation of the two statutory schemes. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127 (1973).

The Southern District of New York in *General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 706 (S.D.N.Y. 1966) concluded that:

> "Neither the briefs of counsel nor independent research by the Court has uncovered evidence that the venue provisions of the Securities and Exchange Acts were intended to supplant the special venue provisions of the National Bank Act—the intention of the Legislature to repeal is not only not clear and manifest, *it is non-existent so far as the evidence is concerned.*" (italics added.)*

Respondent has canvassed the Congressional Committee Reports in both Houses of Congress and the Congressional debates on the Exchange Act. Respondent has not found, and petitioner has not presented to this Court, any evidence of the "considered determination" of the Congressional intent to repeal as prescribed by this Court in *Blanchette, supra.*

Petitioner contends "that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved without excepting Banks". (Br. 16). This Congressional silence, however, falls woefully short of the clearly expressed Congressional intent which this Court has repeatedly and emphatically required to

* This quoted conclusion from *General Elec. Credit Corp.* warrants careful consideration. There, in addtion to the efforts of the Court and of counsel for the parties, the Commission (arguing for implied repeal) and the Department of Justice on behalf of the Comptroller of the Currency (arguing against implied repeal), as *amici curiae*, briefed the question of venue. None of these briefs presented the slightest evidence to the *General Elec. Credit Corp.* court of a Congressional intention, in enacting section 27 of the Exchange Act in 1934, to repeal the provisions of section 94 of the National Bank Act.

effectuate a repeal by implication.* *See Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 266 (1975); *Morton* v. *Mancari, supra* at 551; *United States* v. *Borden Co., supra* at 198-199.

In effect, petitioner seeks to turn this Court's long-standing canon of construction upside down and require Congress to state expressly that it is *not* repealing an earlier statute. The correct rule is exactly the converse. In the absence of express repeal or a showing of clear and manifest intent to repeal, the presumption is that Congress intends no repeal. *Blanchette* v. *Connecticut General Insurance Corporation, supra* at 133-134.

Petitioner further argues that a Congressional intent to repeal section 94 can be inferred from the fact that certain other provisions of the Securities Act of 1933 and the Exchange Act contain explicit exemptions for national banks. *See* 15 U.S.C. §77c(a)(2) (exemption of securities issued or guaranteed by any bank); 15 U.S.C. §77l(2) (exemption from civil liabilities of securities issued or guaranteed by any bank); and 15 U.S.C. §78l(i) (administration and enforcement of certain registration and proxy provisions with respect to securities issued by national banks is vested in the Comptroller of the Currency). Petitioner urges that if Congress had intended national

* In its brief the Commission (Br. 19) refers to Senator Duncan U. Fletcher's report concerning Stock Exchange Practices (Sen. Comm. on Banking and Currency, S. Rep. No. 1455, 73d Cong., 2d Sess., 1934) as evidencing a determination by Congress to include national banks within the purview of the Exchange Act. This report, however, was submitted to Congress *subsequent* to the passage of the Securities Act of 1933 and the Exchange Act. The report surveyed the abuses that led to the passage of those acts, and considered problems with respect to stock exchange practices which might merit further consideration. It did not propose or suggest any new specific legislation.

banks to be exempted from the venue provisions of the Exchange Act, it would have expressly so stated. This argument says too much—it overlooks the fact that there was no need to incorporate a special exemption in the venue provisions of the Exchange Act. Congress by enacting section 94 had already provided specifically for venue in suits against national banks, and had Congress intended to change those venue provisions it would have said so. Congress must be presumed in 1934 to have had knowledge of this existing exemption.* *Erlenbaugh* v. *United States,* 409 U.S. 239, 244 (1972). *See* 1A Sutherland, *Statutes and Statutory Construction,* §23.10 (4th ed., C. Sands 1972).

In *General Electric Credit Corp.* the district court said:

> "Had it been the intention of Congress to exempt national banks from the special venue provisions of the National Bank Act, it is reasonable to assume that they would explicitly have so provided. 'The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation'. (citation omitted.)" 271 F.Supp. at 707.

This analysis is clearly correct. However, the Court in *Ronson* concluded differently. The most that petitioner can draw from the *Ronson* decision is that one court, in a conclusory *per curiam* opinion, has seen fit to reach an opposite decision. This hardly supports a "clear and manifest" Congressional intention to repeal by implication section 94 of the National Bank Act. *United States* v. *Borden Co., supra* at 198-199.

* Petitioner finds himself compelled to admit that ". . . when Congress enacted the 1934 Act it is presumed to have been fully aware of the National Bank Act (Br. 28)."

The provisions of the Exchange Act must be viewed in the context of other legislation enacted in the early 1930's. In 1933 with the passage of the Glass-Steagall Act, 12 U.S.C. §321, Congress specifically and comprehensively considered the relationship between banks and the securities industry, and limited the role of commercial banks with respect to securities transactions. Thus, by 1934 when the Exchange Act was enacted, Congress had legislated with great particularity concerning the role of banks in securities transactions. This is evidenced by the fact that the Exchange Act contains exemptive provisions for banks. When the provisions of the Exchange Act are viewed in the context of the Glass-Steagall Act, it is patent that the Exchange Act was not intended to preempt or to intrude upon other federal legislation affecting national banks.

B. Petitioner Has Failed to Demonstrate Positive Repugnance or Irreconcilable Conflict Between Section 94 of the National Bank Act and Section 27 of the Exchange Act.

Not only has petitioner failed to show a clear intent to repeal,* but he has also failed to carry the other half of his burden—to show positive repugnance or irreconcilable conflict between section 94 and the provisions of section 27 of the Exchange Act. This repugnance or conflict must be demonstrated because if the two venue provisions are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari, supra* at

* Apparently recognizing the impossibility of establishing an implied repeal of section 94, petitioner argues that "It is not even necessary to find an implied repeal here" (Br. 20), claiming that the two venue provisions are " 'supplementary' and that each may be made 'fully effective within their (*sic*) sphere' " (Br. 21).

551. Petitioner appears either to concede there is no repugnancy between the two statutes or to assume repugnancy; nowhere does he show in what manner the two statutes are in fact repugnant.

The applicable rule is that the provisions of one statute, specifically focusing on a particular matter, will always, in the absence of express contrary legislative intent (of which there is none here), be held to prevail over provisions of a different and later statute more general in its coverage.* *Morton* v. *Mancari, supra* at 550-551; *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Washington* v. *Miller,* 235 U.S. 422, 428 (1914); *Rodgers* v. *United States,* 185 U.S. 83, 87-89 (1902).

This Court stated in *Ex Parte Crow Dog,* 109 U.S. 556, 570 (1883):

> "The rule is, *generalia specialibus non derogant.* . . . 'And the reason [for this rule] is,' said Wood, V. C., in *Fitzgerald* v. *Champenys,* 30 L.J. N.S. Eq. 782; 2 Johns. and Hem. 31-54, 'that the legislature . . . *having observed all the circumstances of the case and provided for them,* does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'" (italics added.)

Congress specifically considered the circumstances relating to national banks and accorded them special status

* Cases cited by the Commission such as *Elof Hansson, Inc.* v. *United States,* 178 F. Supp. 922 (Cust. Ct. 1959), rev'd on other grounds, 296 F.2d 779 (C.C.P.A. 1960), *cert. denied,* 368 U.S. 899 (1961) and *Marcello* v. *Ahrens,* 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom. Marcello* v. *Bonds,* 349 U.S. 302 (1955), are clearly distinguishable. In each of those cases the legislative history contained clear evidence as to the intent of Congress.

when it enacted section 94. As this Court stated in *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1882): "We consider [the National Bank] Act as constituting by itself a complete system for the establishment and government of national banks. . . ." In contrast to the highly particularized venue provisions of section 94, the broad venue provisions of the Exchange Act apply to all persons. Although the venue provisions of the Exchange Act may be considered "special" in relation to the general venue provisions contained in 28 U.S.C. §1391, they are clearly *general* venue provisions for the broad spectrum of actions which can be instituted under the Exchange Act. By contrast, section 94 focuses specially on one single, narrow, determinate class. Indeed, with the exception of the provision making venue proper in the district where the violation occurred, the language of the venue provisions of the Exchange Act is similar to that employed in 28 U.S.C. §1391.* And it has been expressly held that section 1391 did not impliedly repeal section 94. *Buffum* v. *Chase National Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *International Refugee Organization* v. *Bank of America,* 86 F. Supp. 884 (S.D.N.Y. 1949).

Petitioner also argues that there is a positive repugnancy between the two enactments merely because if section 94 prevails the Bank can be sued only in Boston, but if the venue provisions of the Exchange Act apply then suit in New York is permissible. This truism is applicable in every case where implied repeal is urged: the *result*

* 28 U.S.C. §1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

reached in a particular action will always differ if it is assumed that the latter statute has repealed the earlier one.

Furthermore, the statutes are not in irreconcilable conflict; they can co-exist. The bank can be sued in Massachusetts. Section 94 simply stands, as it always has, as an exception granted by Congress to national banking associations in order to further the aims for which they are established. Effect can be given to the venue provisions of both the National Bank Act and the Exchange Act.

The very fact that section 94 is mandatory, whereas the venue provisions of the Exchange Act are permissive, is itself sufficient to establish that there is no irreconcilable conflict between the two statutes. A plaintiff's choice of venue under the Exchange Act is not absolute in any event; his action may be transferred under 28 U.S.C. §1404(a), notwithstanding that venue may be proper in the particular jurisdiction in which the action is instituted.*

On the other hand, section 94 commands that venue in an action against a national bank be laid in the district where the bank is established and that, upon the bank's objection, an action brought elsewhere shall be transferred to that district or dismissed as to the bank. Just as plaintiff's initial choice of venue in any securities litigation must give way, under section 1404(a), where the interests of justice and the convenience of witnesses so require, so must a plaintiff's choice of venue give way where a national bank is involved.

* 28 U.S.C. §1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

POINT III

The alleged policy considerations urged by petitioner to support his argument of implied repeal provide no basis for ignoring the plain mandate of Congress.

The alleged policy arguments which petitioner and the Commission advance are inapplicable and unpersuasive. Essentially two points are attempted to be made: First, section 94 was enacted in 1863 and national banks no longer need or deserve the protection of section 94; and second, petitioner will be inconvenienced if required to pursue his purported cause of action against the Bank of Boston.*

The fact that a statute has been on the books for more than a hundred years, and that a litigant may suffer some slight inconvenience through its application does not provide an acceptable basis for this Court to repeal an act of Congress. At least two independent lines of authority demonstrate that Congressional policy with respect to national banking associations remains vital and fully applicable today.

First, this Court's decisions in *Michigan National Bank* and *Mercantile National Bank,* make abundantly clear that section 94 is anything but an anachronism. All the arguments petitioner advances with respect to the age of section 94, its alleged "xenophobic" character, the changed circumstances since its enactment, and the alleged lack of

* We note in passing that it appears that the arguments set forth on pages 23-25 of the petitioner's brief are taken almost verbatim from the arguments of the plaintiff in *McClung* v. *La Salle Nat'l Bank, supra,* and were summarily rejected by the District Court in that case.

need of national banks for the protection of section 94, were as much or more applicable in those cases.

In *Michigan National Bank* this Court reaffirmed its holding that section 94 is mandatory in factual circumstances far more deserving of sympathy than those presented here. In that case the plaintiffs were residents of Nebraska who had purchased housetrailers in Nebraska and executed notes and lien instruments to a local dealer in Nebraska who in turn sold them to a national bank in Michigan. The Court adhered to its ruling in *Mercantile National Bank* and held that the national bank could only be sued in Michigan, where it was established, even though the bank was doing business in Nebraska and had allegedly violated the Nebraska Installment Loan Act.

This Court has ruled expressly on the weight to be accorded speculations concerning the alleged lack of present day relevance of the policy behind the enactment of section 94. In *Mercantile National Bank,* the Court quoted with approval its earlier statement in *First National Bank of Charlotte* v. *Morgan,* 132 U.S. 141 (1889) concerning the policy underlying the venue provisions of the National Bank Act, and stated that:

> "... without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress. . . ." 371 U.S. 561-562, n. 12.

Significantly, this Court, as did Judge Friendly in *Bruns, Nordeman & Co., supra* at 304, has given clear invitations to Congress to amend section 94, if it disagreed with the Court's interpretation of the scope of that section. To date Congress has not accepted these invitations. Such

silence can only be construed as evidence of an intention on the part of Congress to leave undisturbed the existing construction of the venue provisions of the National Bank Act. *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 385 U.S. 182 (1966).

Second, rather than acting to amend section 94, Congress at dates far more recent than 1863 has manifested clearly its intent that national banks shall continue to be considered separately for venue purposes. The court in *Buffum* noted that Congress, in codifying the law in 1948:

> "... repealed only all laws specified in the revision and other superseded and obsolete provisions relating to the courts. It attached a schedule of the laws which it intended to repeal. The House reported that this list had been carefully checked and rechecked many times. Section 94 was not amongst the list of repealed laws." 192 F.2d at 61.

This Congressional recodification of the prior law is further evidence that Congress has, subsequent to the passage of the Exchange Act, addressed itself to the question of the forums in which national banks can and cannot be sued. Thus, the choice to retain section 94 was clearly deliberate.*

In 1957, the Senate passed a bill (S. 1451), entitled the Financial Institutions Act of 1957, the purpose of which was to ". . . remove obsolete provisions from the [banking]

* Congress also codified in 1948, in section 1394 of Title 28 U.S.C., a further venue provision applicable solely to national banks. That section provides:

> "Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located."

statutes, and . . . to add new authority where needed to meet modern conditions." 105 Cong. Rec. 3475 (1959) (remarks of Senator Robertson). Although this bill never reached the floor of the House of Representatives, the version passed by the Senate reenacted section 94 with only technical changes. The Senate by passage of the Financial Institutions Act of 1957 specifically considered and reviewed section 94, and gave no indication that that section was anything but fully effective and vital.

The vitality of section 94 is additionally evidenced by the fact that in 1959, Congress passed twenty-five amendments to the National Bank Act to "clarify or eliminate ambiguities . . . [and] to repeal certain laws which have become obsolete." (2 U.S. Code, Cong. & Admin. News at 2232 (1959).) Once again, despite the passage of such legislation affecting national banks, Congress did not see fit to amend, repeal or modify the venue provisions of section 94.

Any argument that Congress has not paid careful and continuing attention to the specific needs of national banks in the context of other national legislation is contradicted by Congressional history. As this Court recognized in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968):

> "... Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed." *Id.,* at 341.

* * *

> "Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." *Id.,* at 345.

Petitioner also asserts that the policy reasons underlying the Exchange Act are of such all-pervasive importance that they must necessarily override any other statutory provision.* In *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) this Court specifically held that the Exchange Act was not such a broad or pervasive regulatory scheme as to constitute an implied repeal of the antitrust laws insofar as they exempted the New York Stock Exchange from its strictures. Indeed, the Court stated:

> "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and then only to the minimum extent necessary." 373 U.S. at 357.**

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* In support of his conclusion that section 27 of the Exchange Act must prevail over section 94, petitioner makes the bootstrap argument that in 1934 "it seems clear that Congress was consumer concerned and its 1934 Act *was* clearly meant to supersede any earlier conflicting statute" (Br. 12).

** Petitioner's reliance on *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975) and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975) is misplaced. In those cases this Court found that the Exchange Act impliedly repealed the operation of certain provisions of the antitrust laws. To have found that the antitrust laws were applicable would have crippled the entire regulatory framework established by the Exchange Act. In the case at bar, the Court is not faced with a similar problem. Inconvenience to a particular litigant hardly meets the test of a serious frustration of the basic aims of the Exchange Act which was the standard employed in *Silver, supra, Merrill Lynch, supra, Gordon, supra* and *National Association of Securities Dealers, supra.*

There is nothing in the facts of the case at bar that precludes the Exchange Act from "working". The sole issue is in what forum that "work" will be effected. We submit that application of the Exchange Act venue provisions, in contravention of the clear mandate of the National Bank Act, is not necessary "to make the Securities Exchange Act work". If the Exchange Act did not impliedly repeal the antitrust laws in an area so vital and central to the regulatory scheme prescribed by the Exchange Act, how then can it be persuasively argued that the venue provisions of the Exchange Act, which are decidedly peripheral to the main purpose of that Act, can be held to have impliedly repealed the venue provisions of the National Bank Act? The Bank is not immune from the substantive provisions of the Exchange Act. Petitioner clearly is able to assert his claims against the Bank for alleged securities violations in the District of Massachusetts, and thereby seek to effectuate what he conceives to be the purpose of the Exchange Act.

Petitioner's and the Commission's views with respect to policy or the social utility of a legislative enactment may be interesting and informative but they are quite beside the point, particularly when the challenged enactment is the product of a considered and comprehensive legislative determination which retains its vitality.

It is undebatable that the venue provisions of the National Bank Act avoid burdens on national banks and serve other significant functions. The National Bank Act provides that bank examiners "shall examine every national bank twice in each calendar year . . . [and] such examinations [are] to be made more frequently if consid-

ered necessary", 12 U.S.C. §481 (Supp. 1975) (see also Regulations of the Comptroller of the Currency, 12 C.F.R. §4.11). These examinations, designed to prevent alteration or removal of records, and usually made without prior notice, have been determined by the Comptroller to be the most effective way of carrying out his duties under the National Bank Act. To allow suits to be brought against national banks far from the district where they are established and requiring the production of original records and key executives as witnesses in a distant district may well hamper the Comptroller in fulfilling his important supervisory function. To subject a national bank and its key executive officers to suits in districts far from those in which it is established would severely interfere and disrupt the operations and business of that bank.

The Commission's contention that section 94 must be repealed by this Court because it could "have an adverse effect upon the Commission's enforcement activities" (Commission Br. 5) is nothing but gross speculation. As the court in *General Electric Credit Corp., supra,* noted in response to a similar argument "[c]learly both acts can exist together and their co-existence for over thirty years does not appear to have impeded in any way the enforcement of the Securities Exchange Act." 271 F. Supp. at 708. Interestingly, the Commission has not cited one instance in which it has been unable to join a national bank as a party in an enforceemnt action. Moreover, this precise objection was raised in *Mercantile National Bank, supra* at 563, and rejected by this Court with the terse observation that the supposed inconvenience "is a matter for Congress to consider".

In reality, petitioner's chief argument is one of inconvenience to himself as a litigant if compelled to sue the

Bank in Boston.* The desirability of obviating a multiplicity of suits is a consideration which antedates the provisions of the Exchange Act, and is a problem that exists wholly apart from that Act. Section 94 represents a choice by Congress that, as between the inconvenience to a plaintiff's being required to sue a national bank in the district where the latter is established, and the inconvenience to the bank in requiring it to defend itself in a district of plaintiff's choice, the convenience of the bank shall control.

In *Mercantile National Bank,* 371 U.S. at 563-564, this Court expressly rejected an argument based on the desirability of avoiding a multiplicity of suits, stating:

> "Similarly, even if all of the 145 defendants may not be sued in one proceeding in Dallas County with the same facility as they may in Travis County, this, of course, is insufficient basis for departing from the command of the federal statute."

In making a national bank amenable to suit in either federal or state courts, Congress determined, and it has repeatedly confirmed the determination, that such actions must be brought in the district in which the bank is established. This Court, as it has done in the past, should give

* Petitioner also seems to argue that section 94 violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution. That argument was specifically rejected in *Northside Iron,* 480 F.2d 798, 800 (5th Cir. 1973):

> "While the statute does confer a special benefit on national banks, we cannot agree that it lacks a rational basis . . . . 'Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts.' *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 558. . . ."

full effect to that policy determination. Although commentators, including Judge Friendly and the American Law Institute, have been critical of section 94, it has not been suggested by them that this Court should cure perceived deficiencies in section 94.* Rather, it has been recognized that the Congress, and it alone, has the power to eliminate these deficiencies by amendment, repeal or modification of section 94.

As was stated in *Northside Iron,* 480 F.2d 798, 800 (5th Cir. 1973):

> "The historical purpose of the bank venue statute was to protect national banks against inconvenience and disruption in the conduct of their business which might result from removal of records to a foreign district for purposes of defending a lawsuit. *First National Bank* v. *Morgan, supra,* 132 U.S. at 145, 10 S. Ct. at 38. While it is undoubtedly true, as appellants pointed out, that technological advances in transportation and communication in the past century have reduced the potential hardship to a bank of defending a lawsuit in a foreign district, *we cannot say that such distant litigation would not normally entail some inconvenience for the bank and disruption of its business,* or that the special treatment accorded national banks has no rational basis. *If the venue statute is to be amended or repealed, Congress is the body which must act to do so and the body to which appellants' argument should be addressed."* (italics added.)

* Moreover, this Court, to correct alleged deficiencies in section 94, would not have to find that section 27 partially repeals section 94. It is possible, in a proper case, by application of the doctrine of waiver to obviate the restrictive nature of section 94. Also, in certain situations, a proper interpretation of the local action exception to section 94, first enunciated in *Casey* v. *Adams,* 102 U.S. 66 (1880), may accomplish a similar result.

There are 4,708 national banks located in all parts of the United States. Annual Report of the Comptroller of the Currency—1974. It has long been recognized that national banks are unique entities charged with duties to the public, and they operate as fiscal agents of the federal government, notwithstanding that they are the subject of private ownership. *Easton* v. *Iowa*, 188 U.S. 220, 221 (1903). Individually these national banks vary in their size and in the scope of their activities—some are extremely small and local, and others are large and engage in a variety of services. Any change in the National Bank Act is a matter of national importance. As this Court said in *Mercantile National Bank, supra* at 558-559:

> "National banks are federal instrumentalities and the power of Congress over them is extensive .... Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it addressed itself to this matter in the 1863 Act."

In order properly to consider any legislation that would affect these banks, Congress would be required to hold hearings and engage in extensive study.

Any finding of an implied repeal of section 94 would amount to piecemeal judicial legislation by this Court. The only issue presented by petitioner concerns the venue provisions of the Exchange Act and those of the National Bank Act. But, other important federal statutes implementing basic national policies should also be considered in any amendment or revision of section 94. For example, the antitrust laws and the Consumer Credit Protection Act, each enacted subsequent to the National Bank Act, contain broad venue provisions similar to those found in the Exchange Act. *See*, 15 U.S.C. §§15 and 22 and 15 U.S.C. §1640 (e) (1970). This Court recently observed that it does not sit as a "legislative committee of revision". *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 356 (1971), and it should not do so here.

POINT IV

No waiver of the venue provisions of section 94 of the National Bank Act has occurred.

In the end as in the beginning of this proceeding petitioner can only assert that the Bank waived the venue provisions of section 94. A national bank may waive the provisions of section 94, either by an express waiver or by a failure to assert the privilege when such a bank is sued outside the district in which it is established. *See Michigan National Bank, supra; First National Bank of Charlotte, supra.* The qualification by the Bank to perform limited fiduciary duties in New York in connection with trusts and estates pursuant to section 131(3) of the New York Banking Law is not a waiver of the venue provisions of section 94 of the National Bank Act and a consent by the Bank to suit in New York State for alleged violation of the Exchange Act.

Petitioner claimed in the District Court and the Court of Appeals, and now again asserts, that the Bank expressly waived its right to be sued only in the District of Massachusetts because the power of attorney filed by the Bank did not track precisely the language contained in section

131(3) of the New York Banking Law.* This argument was rejected below and it must fail here. No requisite intent to waive this venue right can be implied from the language contained in the Power of Attorney filed by the Bank. The Bank has not voluntarily and intentionally relinquished its right to be sued in the District of Massachusetts, except as to those activities which are within the scope of section 131(3).

In *Buffum* v. *Chase National Bank, supra,* the United States Court of Appeals for the Seventh Circuit when confronted with an almost identical situation as in the instant action, declared explicitly:

> "Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. [citation omitted] It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It [the waiver] must be proved by the party relying upon it. *And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.*" 192 F.2d at 60-61. (italics added).

See Northeast Iron & Metal Co. v. *Dobson & Johnson, Inc., supra.*

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* As required by section 131(3), the Bank filed with the Superintendent of Banks for the Sate of New York a power of attorney which designated the Superintendent of Banks as the Bank's agent in New York upon whom process could be served in any action affecting or relating to an estate, trust or fund held by the Bank or represented by it. As expressly provided by section 131(3), this designation permitted the Bank to engage only in certain limited and specified fiduciary activities.

In order to constitute a waiver of the venue provisions of section 94, the declaration or conduct relied upon must demonstrate a voluntary and intentional relinquishment of the privilege. Here, however, as found by District Court Judge MacMahon, the fact that the power of attorney may be "broad" does not negate an intent to comply only with the provisions of section 131(3). (A. 90a) The power of attorney, as filed by the Bank, is not ". . . manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right . . . ." The power of attorney was filed in compliance with section 131(3) and is consistent only with an intent to qualify to conduct limited fiduciary activities in New York. The scope of the power of attorney and the effect of filing it are clear and unmistakable.

Conclusion

The petition for a writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal of the complaint in this action with respect to The First National Bank of Boston should be affirmed.

Respectfully submitted,

SAMUEL E. GATES
RICHARD I. JANVEY
299 Park Avenue
New York, New York 10017
Attorneys for Respondent

of Counsel:
DEBEVOISE, PLIMPTON, LYONS & GATES
BINGHAM, DANA & GOULD

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APPENDIX

New York Banking Law section 131(3) provides:

3. Except as otherwise provided in article five of this chapter,[3] no corporation other than a trust company shall have or exercise in this state the power of receiving deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in section one hundred of this article, or have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers, and a foreign banking corporation or trust company incorporated under the laws of another state, which by the law of the state of its incorporation may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office of the clerk of the surrogate's court

3. Section 20 *et seq.*

of the county in which application for such appointment is pending (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, upon whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office; provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, upon whom all process in any action or proceeding against [such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund] may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent, or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office.